INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Summary of argument	5
Argument:	
I. The jury properly found that petitioner knowingly and intentionally gave a false answer to a material question	7
A. The question was not impermissibly ambiguous	8
B. The jury could properly reject the view that the answer was truthful and merely unresponsive	12
C. The evidence was sufficient to permit the jury to find that petitioner knowingly and wilfully perjured himself	13
II. A statement which is false by negative implication can be perjurious	14
Conclusion	20
Appendix A	21
Appendix B	43

CITATIONS

Cases:	
Carroll v. *United States*, 16 F. 2d 951, certiorari denied, 273 U.S. 763	15
Debs v. *United States*, 249 U.S. 211	16

471-812—72——1

Cases—Continued

Dolan v. *United States*, 218 F. 2d 454, certiorari denied, 349 U.S. 923 15
Frohwerk v. *United States*, 249 U.S. 204 16
Galanos v. *United States*, 49 F. 2d 898 13
Linden v. *United States*, 254 F. 2d 560 16
Lustiger v. *United States*, 386 F. 2d 132, certiorari denied, 390 U.S. 951 16
Schenck v. *United States*, 249 U.S. 47 16
Silverman v. *United States*, 213 F. 2d 405, certiorari denied, 348 U.S. 828 16
United States v. *Annoreno*, C.A. 7, No. 71–1233, decided May 26, 1972 16
United States v. *Cobert*, 227 F. Supp. 915 ..... 10, 11
United States v. *Gordon*, 138 F. 2d 174, certiorari denied, 320 U.S. 798 16
United States v. *Lattimore*, 127 F. Supp. 405, affirmed *per curiam*, 232 F. 6d 334 10
United States v. *Moran*, 194 F. 2d 623, certiorari denied, 343 U.S. 965 15
United States v. *Pelley*, 132 F. 2d 170, certiorari denied, 318 U.S. 764 16
United States v. *Prochaska*, 222 F. 2d 1, certiorari denied, 350 U.S. 836 16
United States v. *Remington*, 191 F. 2d 246, certiorari denied, 343 U.S. 907 18
United States v. *Slutzky*, 79 F. 2d 504 13
United States v. *Wall*, 371 F. 2d 398 11

Statutes:

Bankruptcy Act, Chapter XI (11 U.S.C. 701 *et seq.*) 2, 3, 13, 14
11 U.S.C. 44(a) 9, 18
18 U.S.C. 1621 2

Miscellaneous:

American Law Institute Model Penal Code (Tent. Draft No. 6, 1957) § 208.20 18

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1011

SAMUEL BRONSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 453 F. 2d 555. The opinion of the district court is reported at 326 F. Supp. 469 and is reprinted as Appendix A to this brief.

JURISDICTION

The judgment of the court appeals (A. 10) was entered on December 10, 1971. On January 3, 1972, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including February 8, 1972. The petition was filed on February 7,

1972, and was granted on April 17, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the jury's finding that petitioner, with full knowledge of the information sought by a material question put to him during a hearing held pursuant to Chapter XI of the Bankruptcy Act, intentionally falsified his answer.

2. Whether an answer disclosing part of the truth that also constitutes a lie by negative implication may be perjurious.

STATUTE INVOLVED

18 U.S.C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

STATEMENT

Petitioner, the president and sole owner of a motion picture production corporation which petitioned for

an arrangement with its creditors pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. 701 *et seq.*), was convicted after a jury trial in the Southern District of New York on one of two counts of perjury. The charges arose from testimony that he gave in June 1966 before the referee appointed to hold hearings to determine the existence and location of the corporation's assets for the benefit of its creditors.[1] He was sentenced to six months' unsupervised probation and fined $2,000. The court of appeals affirmed the conviction, one judge dissenting.

The conviction was based upon the following questions and answers given by petitioner in the bankruptcy proceedings (A. 5):

> Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> A. No, sir.
>
> Q. Have you ever?
>
> A. The company had an account there for about six months, in Zurich.
>
> Q. Have you any nominees who have bank accounts in Swiss banks?
>
> A. No, sir.
>
> Q. Have you ever?
>
> A. No, sir.

The undisputed evidence showed that for a period of nearly five years between October 1959 and June 1964, petitioner had had a personal account in a bank in Geneva, Switzerland, into which he made deposits and

[1] Petitioner was acquitted on a second count charging another instance of perjury in the same proceedings (see A. 6-8).

upon which he drew checks totaling more than $180,000.[2]

In submitting to the jury both the count upon which petitioner was convicted and the one upon which he was acquitted, the court instructed that the "basic issue" was whether petitioner "spoke his true belief" (App. B, *infra*, p. 43). Perjury, the court stated, "necessarily involves the state of mind of the accused" and "essentially consists of wilfully testifying to the truth of a fact which the defendant does not believe to be true" (*ibid.*). Petitioner's testimony could not be found to be "wilfully" false, the court continued, unless at the time the testimony was given petitioner "fully understood the questions put to him but nevertheless gave false answers knowing the same to be false" (*ibid.*). An individual, the court thereafter said, cannot wilfully state a falsehood in response to a question he does not understand," and the jury was therefore instructed that if it found that petitioner "did not understand a particular question put to him by the questioner and therefore gave a nonresponsive answer, that answer cannot be perjurious" (*id.* at 44).

On the other hand, petitioner could be guilty of perjury, the court instructed, if he gave an answer which was "not literally false but when considered in the context in which it was given, nevertheless constitute[d] a false statement" (*id.* at 45); he thus could be guilty, so long as he "understood a particular ques-

[2] Gov. Ex. 6. The last substantial deposit into the account was made in February 1962, and the account was basically inactive subsequent to that time.

tion put to him," even if he "responded in a manner that is technically true" (*ibid.*).

In sum, as the court subsequently instructed, "[t]he words 'knowingly' and 'wilfully' are therefore opposed to the idea of an inadvertent or accidental misstatement," so that if petitioner "by innocent mistake made an erroneous or incorrect statement" or gave "factually incorrect testimony because of surprise, confusion, haste, inadvertence, negligence or an honest belief that he was telling the truth" he could not be found guilty of perjury (*id.* at 46). Only if he "was aware of the fact that he was making a false statement and knew and believed that his statement was false when made," the court instructed, could he be found to have knowingly and wilfully perjured himself within the statutory intendment (*ibid.*).

SUMMARY OF ARGUMENT

In accordance with the clear and careful instructions of the district court, the jury, in convicting petitioner, must have found that his response that the company had an account for about six months in Zurich constituted a false denial of the existence of any personal accounts in Switzerland and that, beyond a reasonable doubt, that response was made with an intent to deceive. Petitioner's contention that the questioning was too ambiguous to provide a foundation for a perjury conviction fails both as a factual and as a legal proposition. The jury was instructed that the petitioner must be found to have understood the question, and it so concluded. The courts below were correct, moreover, in rejecting the attack on the

question as a matter of law; in the context, the question unmistakably sought information about petitioner's personal accounts, if any, and any ambiguity as to whether information regarding corporate accounts was also sought is not legally material. Under either resolution of any such ambiguity, petitioner's response falsely denied, by negative implication, the existence of the personal account.

The contention that the answer was truthful but simply unresponsive also does not withstand analysis. The "unresponsiveness" of the answer would be apparent only to one in full possession of the facts sought to be elicited by the question, and an unresponsive answer knowingly given for the purpose of deceiving the questioner, and having the actual effect of deflecting the inquiry, should properly be considered false and perjurious. Moreover, the evidence here was sufficient to permit the jury to find that petitioner knew of the existence of the personal account at the time he was questioned and had the necessary intent to deceive when he responded.

Given the sufficiency of the evidence supporting the jury's findings beyond a reasonable doubt that petitioner understandingly gave testimony that was false by negative implication and did so with an intent to deceive, there remains the question whether, as a matter of law, such a response nevertheless cannot be the basis of a perjury conviction when the precise words uttered were, as far as they went, literally true. In other areas of the law involving criminal utterances, such as fraud, extortion, and criminal solicitation, the courts do not confine themselves to the literal words

used, but look to the meaning of the words in the context of their utterance. Since the central purpose of the perjury prohibition is to prevent the making of statements that mislead the inquiry and frustrate the effort to uncover the truth, no reason appears why a different approach should prevail in the case of perjury. Indeed, adoption of the debilitating interpretation of the perjury statute urged by petitioner would open the door to serious subversion of the fact finding process in official and judicial proceedings by clever witnesses who, by virtue of their superior knowledge of the underlying facts that are the subject of the inquiry, could with impunity mislead and deceive by half-truths whose essential falsity becomes apparent only with full knowledge of the facts suppressed. The courts below, therefore, correctly held that the perjury statute encompasses knowing and deceitful falsehoods by negative implication, such as petitioner's response here.

ARGUMENT

I. THE JURY PROPERLY FOUND THAT PETITIONER KNOWINGLY AND INTENTIONALLY GAVE A FALSE ANSWER TO A MATERIAL QUESTION

The jury was instructed that it could not convict petitioner on either count unless it found, as to that count, that he fully understood what information was requested of him and gave a response that he knew to be false. By its verdict, therefore, the jury necessarily found that petitioner was not misled or confused by any lurking ambiguity in the question whether "you" have ever had any Swiss bank accounts, and further

that his answer that "[t]he company" had had one "for about six months" constituted a knowing and false denial of the existence of the much more significant personal account which he had maintained over a period of years.[3] Petitioner contends, in effect, that the evidence was insufficient to support the jury's verdict because (1) the question was "too ambiguous" (Pet. Br. 10), (2) his reply was "a true answer which [was merely] unresponsive" (Pet. Br. 6), and (3) there was no evidence that he either was aware that his answer was false (Pet. Br. 14) or had any motive to falsify (Pet. Br. 16).

A. THE QUESTION WAS NOT IMPERMISSIBLY AMBIGUOUS

Petitioner's claim that the question was too ambiguous to permit the jury to find him guilty is predicated upon the argument that "you" could have referred either to his company or to him personally. Both the majority and the dissent in the court of appeals rejected this contention (Pet. App. A5–A6, A13).

[3] It would appear that the jury acquitted petitioner on the second count precisely because it had a reasonable doubt whether he fully understood what information was requested of him by the inquiry embodied in that count. The question asked, on three separate occasions, was whether he had any "interest" in a particular motion picture film which he claimed he had made for the Spanish government (A. 6–7). His negative responses were charged to be perjurious because he allegedly knew that the Spanish government did not "own" the film but rather that he and companies in which he had an interest "did own and have an interest" in it (A. 8–9). The court instructed that he would have to be acquitted on that count if he and his inquisitor "did not understand the words 'own' and 'interest' in the same sense" (App. B, *infra*, p. 44).

The question was put during what is known as a Section 21(a) hearing (11 U.S.C. 44(a)), held to determine the existence and location of assets of a business that, in this case, was essentially a personal enterprise of petitioner although operated by him in corporate form. In that context, the most reasonable interpretation of the word "you" employed by the examiner was that it did not refer to either petitioner or the company *alone,* but rather that it referred to *both;* the interrogator, a lawyer for one of the creditors, would naturally and properly be interested in identifying both corporate and personal assets in order, in ascertaining what was available for the creditors, to determine whether corporate assets had been diverted to petitioner's personal use.

If there was any ambiguity in the question, it could only have been whether "you" referred solely to petitioner personally, or referred both to him personally and to the corporation—in the context, the question could not reasonably have been understood to refer only to the corporation.[4] This ambiguity is not legally significant in the framework of this case, since under either interpretation of the word "you," the question

[4] The question immediately preceding this allegedly ambiguous question was "Do you have any bank accounts in Swiss banks, Mr. Bronston?" This clearly was addressed at least to personal accounts of the petitioner, and the subsequent question provides no basis for a supposition that the context had suddenly switched to an inquiry confined to company accounts. Moreover, as the court of appeals pointed out (Pet. App. A5), the form of petitioner's response, referring specifically to "the company," manifests his understanding that the question embraced personal accounts; otherwise, it would have been unnecessary to preface the answer with the words "the company."

necessarily called for information regarding any personal accounts that petitioner may ever have had in Switzerland. Certainly it was open to the jury—having been clearly instructed that a meeting of the minds between inquisitor and respondent concerning the meaning of a question is a necessary prerequisite for a perjurious answer—to conclude from the form of the questioning and the nature of petitioner's reply that petitioner understood the inquiry to call for revelation of the Geneva account. The jury thus could, and did, properly find that when he asserted in answer to the question that the company had had an account, he said in effect that he himself had had none.

A question will not provide the foundation for a perjury conviction if it suffers from either of two vices arising from ambiguity—(1) that it employs terminology that is vague or confusing; or (2) that it is so worded that it may be asking either of two different questions *and* the defendant's answer is truthful as to one of them. Illustrations of the former possibility are *United States* v. *Lattimore,* 127 F. Supp. 405 (D.D.C.), affirmed *per curiam,* 232 F. 2d 334 (C.A.D.C.), and *United States* v. *Cobert,* 227 F. Supp. 915 (S.D. Cal.). The question in *Lattimore* concerned whether the defendant there was a "follower of the Communist line" and a "promoter of Communist interests" (see 127 F. Supp. at 406)—they thus asked for evaluational characterizations over which reasonable men could differ and which, when embodied in perjury counts, constituted "an open invitation to the jury to substitute, by conjecture, their understanding of the phrase for that of the defend-

ant." *Id.* at 410. In *Cobert,* one of the allegedly perjurious answers was given in response to a question about a "listing post," and nothing in the indictment indicated that the defendant understood the meaning of that phrase. The court found that the phrase was so vague that it would not support a perjury indictment (227 F. Supp. at 918). In the present case, the question called with clarity for specific factual information regarding the existence of petitioner's Geneva account, and the jury found that he so understood it.

Nor did the questioning of petitioner suffer from the second vice mentioned above, that of posing alternative and inconsistent factual inquiries without specifying which alternative is being asked. The contrast with *United States* v. *Wall,* 371 F. 2d 398 (C.A. 6), relied upon by petitioner, is instructive. In that case, the defendant was asked whether she had "ever been on trips with Mr. X," which she denied. The perjury charge asserted that she had been with him in Miami Beach, but the evidence failed to show that she had traveled with him to that city. The defendant could have been on a trip with Mr. X either by accompanying him or by meeting him, but not both, and the question by its terms failed to specify the alternative concerning which the information was sought. There was thus nothing in the defendant's simple negative response to indicate that she had not understood the question to inquire whether she had accompanied him—and as to that interpretation, her answer was truthful. In the instant case, by contrast, petitioner's answer was false and mis-

leading whether the question referred only to personal accounts or to both personal and company accounts.

B. THE JURY COULD PROPERLY REJECT THE VIEW THAT THE ANSWER WAS TRUTHFUL AND MERELY UNRESPONSIVE

Petitioner suggests that, if the question unambiguously called for information regarding his personal accounts, his answer was unresponsive but truthful, and that it is unwarranted to treat an answer of this character as perjurious (Pet. Br. 10). Similarly, the dissent in the court of appeals urges that, by mentioning the corporate account, petitioner sought to do no more than avoid the question, in like fashion to an evasive response that "My daughter attended school in Switzerland" (Pet. App. A14). This analogy, however, is plainly inapposite; it equates with petitioner's answer a statement that is manifestly unresponsive, that could not possibly deflect the course of the inquiry or be construed as a representation of any sort regarding bank accounts, and that could not be found by the jury to indicate an understanding of the question and a willful purpose to mislead the interrogator by a false negative implication. In the present case, by responding with information about the corporate account, petitioner did more than just avoid the issue of his personal account; as the majority below held, his answer constituted a denial "by negative implication" that he had had any personal accounts (Pet. App. A7). The jury, therefore, justifiably viewed his response as a false averment that his only Swiss account had been the corporate one.

Petitioner's answer was thus not comparable to the answers held to be non-perjurious in *Galanos* v. *United States,* 49 F. 2d 898 (C.A. 6), and *United States* v. *Slutzky,* 79 F. 2d 504 (C.A. 3). In those cases, the defendants gave simple negative answers that were both entirely responsive and entirely truthful; Galanos was asked specifically whether he himself had made arrangements to obtain a bail bond for an individual and whether he had personally procured another person to sign the bond (see 49 F. 2d at 898–899), and Slutzky was asked specifically whether he had been convicted of a "felony" (see 79 F. 2d at 505). Since Galanos had done no more than join with others in agreeing to indemnify the person who had actually arranged for and signed the bond (see 49 F. 2d at 899), and since the State in which Slutzky had been convicted did not classify offenses as "felonies" (see 79 F. 2d at 505), their negative answers constituted truthful replies to the precise questions asked. In neither case did the defendant—as did petitioner here—make affirmative statements of one fact that in context constituted denials by negative implication of a related fact.

C. THE EVIDENCE WAS SUFFICIENT TO PERMIT THE JURY TO FIND THAT PETITIONER KNOWINGLY AND WILFULLY PERJURED HIMSELF

We need not pause long over petitioner's contention that there was an insufficient showing that he remembered his personal account (which had been closed two years prior to the Chapter XI hearing) and intentionally neglected to disclose it. As the district court pointed out in denying his motion for judgment of

acquittal or a new trial, the jury could reasonably have found it unlikely that he would remember a corporate account which had existed for only six months and at the same time forget a personal account that had had a longer life and had been used actively and extensively for personal and business transactions (App. A, *infra,* p. 28). Similarly, the waiver of Swiss bank secrecy that petitioner had executed was hardly conclusive that he had no motive or reason to conceal his personal account at the Chapter XI hearing, as petitioner suggests (Pet. Br. 14). As the court below noted, "[t]he jury could have been more impressed by the facts that the purported waiver of bank secrecy referred to all banks in Switzerland and listed seventeen company names under which an account could have been opened (creating the proverbial needle-in-the-haystack situation)" (Pet. App. A 9, n. 5).

II. A STATEMENT WHICH IS FALSE ONLY BY NEGATIVE IMPLICATION CAN BE PERJURIOUS

Implicit in the position of petitioner and the dissent below is the contention that a statement which is false only by negative implication rather than by its express language cannot be perjurious. This contention does not challenge the sufficiency of the evidence, but in essence attacks the trial court's instruction that a statement which is "technically true" or "not literally false" can nevertheless be false "when considered in the context in which it was given" (App. B, *infra,* p. 45). As the dissent put the proposition, "[w]hether [petitioner's] answer was calculated to mislead the questioner and frustrate the bankruptcy proceedings

should not here concern us," since "once testimony is found truthful there can be no perjury conviction as a matter of law" (Pet. App. A11).

We perceive no reason why the scope of the offense of perjury should be limited in this debilitating fashion. Contrary to the dissenting view below, it is of central concern to the purpose of the perjury statute whether petitioner's reply was calculated to mislead the questioner and frustrate the bankruptcy proceedings. Misleading the questioner and thereby frustrating official or judicial proceedings is precisely the evil at which the perjury statute is aimed; indeed, the test for the materiality of false testimony is whether it "has a natural effect or tendency to influence, impede or dissuade the investigating body from pursuing its investigation." *United States* v. *Moran*, 194 F. 2d 623, 626 (C.A. 2), certiorari denied, 343 U.S. 965; see also *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763; *Dolan* v. *United States*, 218 F. 2d 454, 458 (C.A. 8), certiorari denied, 349 U.S. 923. The perjury statute should not be interpreted so as to put a premium on the artfulness with which a witness or affiant deceitfully frustrates an inquiry.

No other statute condemning criminal utterances is interpreted so as to determine the criminality of an utterance solely by reference to the precise language used and not by reference to the information or idea that the language is calculated and intended to convey. For example, fraudulent misrepresentations are not limited to statements that are literally untrue, but include as well "deceitful statements of half truths

or the concealment of material facts." *Lustiger* v. *United States,* 386 F. 2d 132, 138 (C.A. 9), certiorari denied, 390 U.S. 951; see also *Silverman* v. *United States,* 213 F. 2d 405, 407 (C.A. 5), certiorari denied, 348 U.S. 828. It is "[n]ot words alone, but their arrangement, the manner of their display, and the circumstances in which they are used [that] may create an appearance which is false and deceptive, even though the words themselves fall short of this." *Linden* v. *United States,* 254 F. 2d 560, 568 (C.A. 4). Similarly, whether an utterance is extortionate is not determined solely by reference to the precise words of the utterance, but rather by "the context in which they are used, measured by the common experience of the society in which they are published." *United States* v. *Prochaska,* 222 F. 2d 1, 2 (C.A. 7), certiorari denied, 350 U.S. 836; *United States* v. *Annoreno,* C.A. 7, No. 71–1233, decided May 26, 1972, slip opinion at 8–9. Even in so sensitive an area as advocacy—invoking questions of First Amendment protection—whether an utterance is an incitement to unlawful conduct is not determined solely by the literal meaning of the precise words used but rather by their "natural and intended effect." *Debs* v. *United States,* 249 U.S. 211, 215; see also *Schenck* v. *United States,* 249 U.S. 47, 51; *Frohwerk* v. *United States,* 249 U.S. 204, 207–209; *United States* v. *Pelley,* 132 F. 2d 170, 177 (C.A. 7), certiorari denied, 318 U.S. 764; *United States* v. *Gordon,* 138 F. 2d 174, 175–176 (C.A. 7), certiorari denied, 320 U.S. 798. There is no reason why any different rule should be applied in cases of perjury.

It is no answer to say, as did the dissent below, that in cases such as this the burden should be "on the questioner to recognize when he is being led astray," and that he must consequently ask "a more precise question" (Pet. App. A15); nor is it relevant, as petitioner asserts, that in this case the examiner "need only have asked one more question, whether [petitioner] personally had had an account" (Pet. Br. 8). Both arguments are predicated on the erroneous premise that petitioner's answer was true and at worst unresponsive (see Pet. Br. 7; Pet. App. A14–A15) rather than false by negative implication. The jury, however, justifiably found that petitioner, when asked about Swiss bank accounts, stated in effect that there had been only the one corporate account; if the answer was truthful, as it purported to be, the subject was exhausted, and the examiner had no reason to inquire further about personal accounts.[5] Further inquiry was thus "successfully deflected" (see Pet. App. A15) by the very device that the perjury statute was enacted to prohibit—an answer that misinformed the

[5] The conclusion that the natural tendency and effect of the answer was to foreclose further inquiry on the subject is not in any way undercut—rather, it is supported—by the subsequent questions and answers about the Rome bank account that petitioner cites (Pet. Br. 11). In that instance, he answered the question whether "you" had a bank account in Rome with an averment that "we" had had one. The nature of this response alerted the examiner to an ambiguity as to the owner of the account and prompted the examiner to inquire further whether "we" was used in the corporate or personal sense. As to the question here at issue, the seemingly clear, comprehensive, and precise reply that "the company" had had a Swiss account closed that subject by impliedly negating the existence of any additional personal or corporate accounts.

questioner. Of course, an examiner can always avoid successful deflection of his line of inquiry if he recognizes that he is being lied to, but that can hardly be deemed a valid reason to immunize the successful liar from punishment.[6]

As the court of appeals pointed out, the need for clear, responsive, and truthful answers is particularly great in a proceeding such as a Section 21(a) examination, which by its nature constitutes a search for assets that may prove difficult to discover. Since the information sought is, in such a case, generally within the peculiar knowledge of the witness, the opportunities for deception and fraud through the statement of misleading half-truths are greater than usual; it is

---

[6] Petitioner does not advance his case by invoking the concept of "objective truthfulness" enunciated in the American Law Institute Model Penal Code (Tent. Draft No. 6, 1957), § 208.20, Comments, pp. 116–118 (Pet. Br. 9). "Objective truthfulness," as used by the drafters of the code, does not embrace statements which are half or technically true but nevertheless convey false information; the drafters' concern was with statements which are in fact true but which the utterer does not believe to be true. The comment was prompted by *United States* v. *Remington*, 191 F. 2d 246 (C.A. 2), certiorari denied, 343 U.S. 907, which held that a denial of membership in the Communist party could be perjurious if the person making the denial believed that he was a member, even though in fact he was not. Petitioner's perjury in this case was not a subjective falsehood which objectively was truthful; the objective fact was that he had had the personal Swiss bank account whose existence he denied to the examiner. It does appear elsewhere in the Comments, however, that the drafters of the Model Penal Code would require proof of literal falsity for a perjury conviction. See Tent. Draft No. 6, Comments, *supra* at 124–125. For the reasons stated in this brief, we do not believe that view accurately states the law or adequately implements the policies and requirements of the federal perjury statute.

frequently extremely difficult for the examiner to realize, in the face of an answer such as petitioner's, that something has been concealed (Pet. App. A7–A8).

And, of course, the mischief that could flow from the rule proposed by petitioner and by the dissent below is not confined to bankruptcy proceedings. For example, applicants for professional licenses and nominees for executive appointment, being questioned under oath concerning past incidents or the basis for prior disciplinary sanctions having a bearing on their present fitness to be licensed or to hold office, could without penalty state the most innocuous version of the incident or basis for the sanction, with the intent and effect of creating the impression that what they stated was the entire story. In like fashion, taxpayers being examined under oath could seek by deceit to hide sources of their income or information that would establish that they had understated their income. Similar misleading answers could effectively frustrate factually complex investigations or trials of alleged antitrust violations or securities frauds.

These examples hardly exhaust the possibilities. If petitioner's narrow view of the offense of perjury were to prevail, a new element of chance and wit would be introduced into judicial and official proceedings of all sorts. Lawyers would be able to advise their clients that they could with impunity give any kind of misleading answer so long as their words are literally truthful. And sophisticated witnesses with superior knowledge of the underlying facts would often be able to conceal and distort the truth, outwitting their interrogators in ways that become appar-

ent only when the true facts are known. Answers that appear on their face to be complete and responsive thus would have to be scrutinized from every angle with the utmost care, lest they turn out to be half-truths denying by negative implication information clearly sought to be elicited by the question. As a result, questions that today would be considered wholly unnecessary and redundant would proliferate.[7] There is no sound reason to construe the perjury statute so as to invite such consequences and to sanction the kind of deceit practiced by petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

ANDREW L. FREY,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,

MARSHALL TAMOR GOLDING,
Attorneys.

JULY 1972.

---

[7] For example, if a witness answers the question "Who attended the meeting of June 1?" with the statement "Smith and Brown," it will be necessary to ask the further question "Anyone else?" since the witness could, under petitioner's view of perjury, freely suppress the information that Jones and Robinson also attended.

APPENDIX A

United States District Court, S.D. New York

April 15, 1971

(No. 69 CR 696)

UNITED STATES OF AMERICA

v.

SAMUEL BRONSTON, DEFENDANT

Memorandum

TENNEY, *District Judge.*

The defendant, Samuel Bronston, having been tried before a court and jury and found guilty of one count of perjury in violation of Section 1621 of Title 18 of the United States Code, moves pursuant to Fed. R. Crim. P. 29 for judgment of acquittal or, in the alternative, for a new trial under Fed. R. Crim. P. 29 and 33.

Count one of the indictment[1] in substance charges that Mr. Bronston knowingly testified falsely before a referee in bankruptcy in an arrangement proceeding conducted pursuant to Section 21, sub. a of the National Bankruptcy Act, 11 U.S.C. § 44, in order to conceal the existence of a personal bank account previously maintained by him in Geneva, Switzerland.

Before considering the arguments of counsel in support of this motion, it would be useful to set forth the questions and answers which are the subject of count one.

[1] The defendant was tried upon a two-count indictment and acquitted of the charge in the second count.

1. Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
A. No, sir.
2. Q. Have you ever?
A. The company had an account there for about six months, in Zurich.
3. Q. Have you any nominees who have bank accounts in Swiss banks?
A. No, Sir.
4. Q. Have you ever?
A. No, Sir.

It is not disputed that movant's responses to questions 1, 3 and 4 were in all respects truthful. However, the response given to the inquiry as to whether he had ever had a Swiss bank account (question 2) was, although perhaps literally true, unresponsive to the question posed. The Government argues, as it did at trial, that this constituted a flat denial of ever having personally maintained a Swiss bank account.

In moving for judgment of acquittal, the defense urges that as a matter of law such testimony cannot be perjurious. The Government, on the other hand, contends with equal vigor that an unresponsive answer may be perjurious if tantamount to a willful attempt to conceal the truth.

After considering movant's numerous arguments set forth in meticulously prepared papers in support of these motions, the Court, for reasons to be noted *infra*, is constrained to deny the motions and permit the jury's verdict to stand.

Analysis of the issues raised on the Rule 29 motion for judgment of acquittal must necessarily begin with close scrutiny of the questions posed to the defendant. To be sure the interrogation was most inept; but this only begs further inquiry as to whether question number 2 was misleading or incapable of eliciting a single honest answer, or whether defendant could consciously

have taken advantage of the situation by giving an unresponsive answer in order to avoid disclosure of his Geneva account.

[1] It is well settled that a person may not lawfully be convicted of perjury unless the question put to him adequately tests his belief in the truthfulness of his response. *United States* v. *Wall*, 371 F. 2d 398, 400 (6th Cir. 1967). This is essentially because perjury is a highly personalized crime, conviction for which is to a great extent dependent upon proof of the accused's belief in the truthfulness of his sworn testimony. *United States* v. *Winter,* 348 F. 2d 204, 210 (2d Cir.), cert. denied, 382 U.S. 955, 86 S. Ct. 429, 15 L. Ed. 2d 360 (1965).

[2, 3] Thus, assuming as we have, that the questioning of the defendant was less than skillful, it nevertheless seems plain that the question—"[h]ave you ever" had a Swiss bank account?—admits of but a single interpretation calling for a simple yes or no answer. This question is patently not misleading and readily susceptible to a truthful and responsive answer. Movant unavailingly cities *Galanos* v. *United States,* 49 F. 2d 898, 899 (6th Cir. 1931), wherein the Court of Appeals for the Sixth Circuit reversed a perjury conviction and noted that "[p]erhaps, if * * * [the defendant] had been asked specifically, he would have answered truly". In the instant case, after Mr. Bronston replied negatively to the question—"Do you have any bank accounts in Swiss banks * * * ?"—he was specifically asked: "Have you ever?". Thus, in plain unambiguous language the defendant was specifically asked the crucial question to which he evasively replied. The distinction between *Galanos, supra,* and the instant situation is thus apparent and unworthy of further comment. Moreover, since a 21–A examina-

tion is in the nature of a "fishing expedition"[2] conducted for the purpose of locating assets of the debtor, there is no duty upon the examiner to rephrase each question, or to warn the witness to testify truthfully. It is in fact the bankrupt and not the interrogator who would have exclusive knowledge of the whereabouts of his assets. As noted by Judge Weinfeld in United States v. Winter, *supra,* 348 F. 2d at 210, "[o]nce a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it."

Similarly inapposite is the situation that existed in *United States* v. *Wall, supra,* 371 F. 2d at 399, wherein the defendant denied having "ever been on trips with Mr. X". The indictment charged that this testimony was perjurious in that the defendant "had been on a trip with Mr. X in Miami Beach, Florida * * *." In response to defense counsel's inquiry at a hearing before the district court, as to what the words "on a trip" meant, the government attorney in substance replied that it could mean either that one person accompanied another some place or that two persons were at a particular place together. On appeal, the court of appeals indicated that the evidence at trial, although improperly received, clearly demonstrated that the defendant did not accompany Mr. X to Miami Beach. Although there was competent and sufficient evidence to establish that the accused and Mr. X were in Miami Beach together, the conviction below was reversed, the court noting that "the question upon which the perjury charge was based, was inarticulately phrased * * * [since it] was susceptible of two different interpretations". *United States* v. *Wall, supra* at 399–400.

---

[2] Trial transcript (hereinafter referred to as "Tr.") of Jan. 27, 1971 at 90.

It seems clear that the question posed to the defendant herein did not admit of different plausible interpretations and was sufficiently precise to test the accused's belief in the truthfulness of his answer. Cf. *United States* v. *Wall, supra* at 400; *United States* v. *Lattimore,* 127 F. Supp. 405 (D.C.D.C.), aff'd, 98 U.S. App. D.C. 77, 232 F. 2d 334 (1955).

I am also not persuaded that the district court's rulings in *United States* v. *Cobert,* 227 F. Supp. 915 (S.D. Cal. 1964), compel a conclusion to the contrary. Indeed, in language similar to that used in *Cobert, supra,* at 919, the jury was instructed that if they found that "the defendant did not understand a particular question put to him by the questioner and therefore gave a non-responsive answer, that answer cannot be perjurious, [since] [o]ne cannot wilfully state a falsehood in response to a question he does not understand." [3] The jury was further charged, although admittedly with an emphasis on count two, that if "the questions were less precise than they should have been, this * * * [should not] be permitted to prejudice the defendant".[4] In the instant case, the jury must have rejected any contention that the defendant's non-responsive answer resulted from a misunderstanding of the simple question put to him; that is, his response must have been considered by the jury as one that reflected perjury and not a misunderstanding. See *United States* v. *Sweig,* 316 F. Supp. 1148, 1164 (S.D.N.Y. 1970).

[4,5] Movant further urges that an acquittal is warranted under the holding of *United States* v. *Slutzky,* 79 F. 2d 504 (3rd Cir. 1935), wherein the court noted that the questions put to the accused must search for the truth, and reversed a conviction because the answer which was the basis of the perjury indict-

[3] Tr. Feb. 2, 1971 at 12.

[4] *Id.*

ment was technically and actually *responsive* and correct. The critical and controlling distinction between the response in *Slutzky, supra,* and the one given herein, is that while Mr. Bronston's answer may have been truthful, it was not responsive. Thus, although a truthful and responsive answer may not be perjurious, a technically truthful but unresponsive one may. Again, the jury was specifically instructed on this point.[5] From the foregoing it seems clear that movant's answer to the second question was not "literally accurate, technically responsive, or legally truthful" within the meaning of *Smith* v. *United States,* 169 F. 2d 118, 121 (6th Cir. 1948); accord, *United States* v. *Wall, supra,* 371 F. 2d at 400; *see Galanos* v. *United States, supra,* 43 F. 2d at 899.

I similarly reject defendant's contention that the holding of *Fotie* v. *United States,* 137 F. 2d 831 (8th Cir. 1943) requires that a judgment of acquittal be entered on count one. Although the language from *Fotie* cited by movant is indeed strong, the facts underlying the reversal therein significantly undercut the thrust of the defendant's argument. In response to inquiries as to whether he ever swore that he was born in Italy or ever applied for naturalization papers in the United States, the defendant in substance answered negatively but qualified his response by stating that he did not remember. *Fotie* v. *United States, supra* at 842. Thus, in order to establish the guilt of the accused it was incumbent upon the Government to establish that he remembered filing a declaration of intention to become a citizen, in which he swore that he was born in Italy. When shown an original and duplicate of his declaration, filled out approximately 24 years prior to the examination which formed the basis of the indictment, he promptly admitted the

[5] *Id.* at 13.

genuineness of the document and that the signature thereon was his. He denied, however, any recollection of placing his signature thereon. Inasmuch as the issue was not whether he had in fact filled out the application, but rather whether he remembered doing so some 24 years before, the conviction on this count was reversed since there was no proof of anything other than that the act not remembered did in fact occur. *Fotie* v. *United States, supra* at 842.

Thus, while in *Fotie, supra,* the alleged perjury was based upon a defendant's denial of remembering an oath made by him 24 years prior to the questioning upon which the indictment was based, the situation herein involves a Swiss account which existed only two years prior to the interrogation and which was active four years prior thereto. Moreover, Mr. Bronston never disclaimed knowledge of ever having personally maintained a Swiss account; but, rather, he unresponsively and perhaps evasively answered that his company had one. I do not suggest that in the instant case mere proof of the existence of the account would suffice to sustain the conviction; rather I wish to place in proper perspective the amount of recall at issue in each case.

[6, 7] Finally, with regard to defendant's motion for judgment of acquittal, the Court must consider whether the facts from which the jury could have inferred the defendant's state of mind were sufficiently proved by direct evidence. *United States* v. *Remington,* 191 F. 2d 246, 249 (2d Cir. 1951), cert. denied, 343 U.S. 907, 72 S. Ct. 580, 96 L. Ed. 1325 (1952). Initially it should be noted that the waiver of bank secrecy, the document so heavily relied upon by movant which was executed in 1965, could have been considered by the jury as direct evidence that when it was executed the defendant was aware of the existence of the Geneva account. The jury could thus have

further inferred that he remembered this account when he was questioned in 1966. In addition, although the account was closed for two years and dormant for two more prior thereto, there was direct proof that while the account was active it was used extensively for personal and business transactions. (Indeed, the jury requested that the exhibits of the cancelled checks be furnished them during their deliberations.) Further, the fact that the defendant unhesitatingly recalled that he presently had no Swiss accounts or nominees with such accounts, but remembered that his corporation had one in Zurich for about six months, could properly have been considered by the jury as direct evidence from which they could infer that movant was familiar with, and remembered his foreign financial affairs. Finally, since the cancelled checks in evidence were, for the most part, substantial in amount, this is also direct evidence which could suggest or at least permit the inference that when the defendant was questioned before the referee, he was aware of the existence of the account.

Defendant alternatively moves for a new trial under Fed. R. Crim. P. 33,[6] based upon the prosecution's allegedly improper and prejudicial summation. Central to his argument herein is the contention that a key issue for the jury on count one was whether the defendant kept his Geneva account secret from his principal creditor Pierre duPont III. That part of the Government's summation placed in issue by the defense is as follows:

> He never said in that waiver, "I have an account at the International Credit Bank in Geneva. I have a specific account."

---

[6] Defendant also moves for a new trial under Fed. R. Crim. P. 29, but since there is no issue of credibility this motion is also denied.

He just says, "Any accounts that I may have", and he also lists a whole slew of companies.

Mr. Elsen says, "Well, Mr. duPont knew about it."

How did Mr. DuPont know about it? By this one document? This is the document they seem to rely on, where the account was started after $75,000 was transferred to the Chase Manhattan Bank.

First of all, there is nothing that says [sic] here anything about the International Credit Bank except Bank Redint. If you are pretty well knowledgeable in these cable addresses then you know, then you can trace it, that that is the International Credit Bank. But there is nothing in that document that says that he opened an account there and there is nothing in any document that the defendant has produced that says that he opened an account there.

There is no way that Mr. duPont would have known about this. And if Mr. duPont had known about this, why did it take him until 1968 to find out about it? You recall the waiver was signed in 1965. It was in August of 1968, two years after he testified and lied about it, that Mr. duPont's representative went to the bank and ascertained that there did exist in fact a bank account there, or had, in Mr. Bronston's name.

Mr. Elsen, the defense has called all these witnesses, peripheral witnesses, to establish that Mr. duPont knew about this. Why not call Mr. duPont—there has been no evidence that he is not alive and well and living in Wilmington right now—if you want to prove that Mr. duPont knew about this.[7]

Initially, it should be noted that at trial defense counsel's only serious objection to the Government's summation was made after the assistant, in effect,

[7] Tr. Feb. 1, 1971 at 92–94.

commented upon the defendant's failure to testify, by stating that "Mr. Bronston didn't state anything to you [the jury]."[8] In response to this objection, the prosecution argued that it made this statement in reply to that part of defense counsel's summation which suggested that the defendant had in fact testified. The record is clear that counsel for movant did, although perhaps inadvertently, state: "Mr. Bronston, as he told you, in his mind * * * considered the Spanish Government to have first claim. * * *"[9]

[8] When the prosecutor's comments are balanced against those of defense counsel and it is considered that the government attorney followed his comment about Mr. Bronston's not stating anything to the jury by explaining that what the defendant allegedly said was "stated to the officials whose depositions you [the jury] heard",[10] it seems plain that this aspect of the summation does not fall within the proscription of the Supreme Court's rulings in *Anderson* v. *Nelson*, 390 U.S. 523, 88 S. Ct. 1133, 20 L. Ed. 2d 81 (1968); *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); and *Griffin* v. *California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Furthermore, although not in the language suggested by the defendant, the Court instructed the jury that the defendant had a constitutional and legal right not to testify and that exercising this right could in no way be considered against the defendant.[11]

Before refocusing our attention on that part of the government summation quoted above, certain other observations must be made. First with regard to the prosecution's rhetorically asking "[w]hy not call Mr.

---

[8] *Id.* at 100, 104–06.

[9] *Id.* at 79.

[10] *Id.* at 100.

[11] Tr. Feb. 2, 1971 at 26–27.

duPont—there has been no evidence that he is not alive and well and living in Wilmington right now—if you want to prove that Mr. duPont knew about this," [12] the Court noted that "[t]he only evidence on Mr. duPont was improperly injected by * * * [the prosecution] in the course of * * * [its] summation [13]," and instructed the jury that "even if Mr. duPont was equally available to both sides, no inference can be drawn against the defendant because Mr. duPont was not called". [14] In addition, the jury was instructed that since there was "evidence that Mr. duPont was hostile to the defendant * * *, cooperating with the prosecution * * * [and] could have been called by the government * * * [the jury could] draw an adverse inference against the government from the failure of the prosecutor to call him." [15] Of course, the jury was further charged that anything said by counsel for the Government or defense "with respect to matters in evidence, whether during the trial, in argument or in summation, is not evidence in the case." [16]

[9] Thus, although it was improper for the Government to offer testimony as to the whereabouts of Mr. duPont, I am confident that the Court's charge with regard to this matter sufficiently warned the jury not to accept the Government's unsworn testimony about duPont as evidence that if he were called he would deny any prior knowledge of the Swiss account in issue.

[10–12] Movant's final two objections to the Government's summation allege that the prosecutor prejudicially distorted the chronology of events leading up to

---

[12] Tr. Feb. 1, 1971 at 94.

[13] Tr. Feb. 2, 1971 at 31.

[14] *Id.* at 27.

[15] *Id.*

[16] *Id.* at 28.

the discovery of the Geneva account and that the prosecution incorrectly stated that the defense failed to produce evidence that duPont knew of the opening of the account in Geneva. Since these objections were not interposed at the close of the Government's summation and no protective instructions were sought, doubtless defendant could be deemed to have waived these objections. *United States* v. *Aadal,* 368 F. 2d 962, 965 (2d Cir. 1966), cert. denied, 386 U.S. 970, 87 S. Ct. 1161, 18 L. Ed. 2d 130 (1967); *United States* v. *Johnson,* 331 F. 2d 281, 282 (2d Cir.), cert. denied, *Pheribo* v. *United States,* 379 U.S. 905, 85 S. Ct. 196, 13 L. Ed. 2d 178 (1964). In any event, careful consideration of the merits of these arguments belie their validity. Although the Government admittedly did not go through the chronology of events before the Geneva account was opened, with the same precision defense counsel has in his memorandum of law submitted in support of this motion, the Government's statements were a fair prosecutorial summary of record evidence which could support a conviction. The Government is not obliged to dwell in its summation upon matters which will mitigate the thrust of its proof. Inasmuch as the waiver of secrecy was given the creditors in 1965,[17] assigned to Mr. duPont in June of 1967,[18] after which time he appointed Mr. Michael Stern his attorney in fact,[19] and the account was in fact finally discovered in August of 1968,[20] it was neither unfair nor improper for the Government assistant to state that if Mr. duPont knew about the account when it was opened why did it take him until 1968 to discover it.

---

[17] Def.'s Exh. B.

[18] Def.'s Exh. C.

[19] Def.'s Exh. D.

[20] Tr. Jan. 27, 1971 at 79-80.

[13] Moreover, since the defendant contends that Mr. duPont, as his principal creditor, knew about the existence of the account since 1959, when it was opened, it was not improper for the prosecution to hypothetically ask the jury why it was not until two years after Mr. Bronston denied having such an account that Mr. duPont's representative finally discovered it.

I find naive defendant's specific criticism of the prosecution for not referring to those defense exhibits which would indicate that Mr. duPont was in fact aware of the opening of the account. More specifically, I find untenable and reject movant's claim that a new trial is warranted because the Government incorrectly stated in its summation that there was no evidence that duPont knew about the account. Perhaps if this inaccurate comment were uncontradicted by the trial exhibits and testimony, and defense counsel's summation, a different result would be reached. That is, even though the Government's statement that "there is nothing in any document that the defendant has produced that says that he opened an account there," [21] is inaccurate and contradicted by the evidence,[22] it does not run afoul of any authority cited by movant or discovered by the Court.

Finally, it must be noted that defense counsel's summation specifically dwelt on the testimony and exhibits relative to duPont's knowledge of the existence of the account.[23] That the jury perhaps did not think it relevant whether duPont knew of the existence of the account, or did not send for defendant's exculpatory exhibits, is unfortunate for the defense, but it by no means follows that the jury was unaware of the exist-

[21] Tr. Feb. 1, 1971 at 93.

[22] *E.g.*, Def.'s Exhs. I and J.

[23] *Id.* and Tr. Feb. 1, 1971 at 57–60.

ence of the exhibits or was convinced by the Government's inaccurate statements that there was no such evidence.

[14] Lastly we consider defendant's motion for an acquittal or a new trial under Fed. R. Crim. P. 33 based upon the Government's alleged deprivation of exculpatory evidence from the defense. Assuming for purposes of this motion that the following facts, as summarized from the affidavit [24] filed in support of this motion are true, the Court finds the relief requested unwarranted and denies movant's request for a hearing on this issue.

On November 16, 1970, defense counsel met in London, England, with the defendant and Irwin Margulies, Esq., a former New York attorney who represented Mr. Bronston in the past. After showing Mr. Margulies various correspondence and cables relating to the opening of the Geneva account, he (Margulies) indicated that he remembered the transaction, apparently since he introduced Mr. Bronston to the bank and arranged the discount, and that he had told Mr. duPont all that he knew about the matter.[25] In addition, the three men discussed loans made by Mr. Margulies to the defendant through the Dorchester Establishment.[26] In response to an inquiry, defense counsel assured Mr. Margulies that his personal financial affairs would not become involved in the event that he testified on Mr. Bronston's behalf.[27] Admitting a preference to being deposed rather than attending trial, Mr. Margulies nevertheless agreed to come to testify after his New York attorney, Ben-

[24] Affid. of Sheldon H. Elsen, Esq. (dated March 16, 1971).
[25] *Id.* at ¶ ¶ 7–10.
[26] *Id.* at ¶ 11.
[27] *Id.* at ¶ 12.

jamin Poznansky, Esq., reviewed the matter.[28] On January 21, 1971, ten days after the trial was originally scheduled to commence, the defense learned that Mr. Margulies was too ill to come to New York and that Mr. Michael Stern, a person closely associated with the prosecution in this case, had spoken to Mr. Margulies. Mr. Stern was the person sent by Mr. duPont to Geneva to examine the records of Mr. Bronston's account. It further appears, although the significance and relevance of this escapes the Court, that Mr. Burnand, counsel for the Geneva bank who testified on behalf of the prosecution, was called by the Zurich lawyer who presented the Geneva bank with the waiver of secrecy, and was requested to come to New York to testify. Burnand was further advised that Mr. duPont would pay his travel expenses. On the advice of the Geneva bank's New York counsel, Mr. Burnand insisted that the Government reimburse him for his expenses.[29]

Returning to the events of January 21, when it was learned that Mr. Margulies was too ill to come to New York, movant advised the prosecution of its intent to seek leave to depose Mr. Margulies in London. The defense was told by the government attorney that Mr. Margulies had recently called Mr. Stern and informed him that he was requested to come to New York and testify, but before he did so he wanted assurance that there would be no inquiry into his own personal financial affairs. Mr. Stern apparently gave no such assurance.[30]

According to the defendant, and since a hearing is being denied, for purposes of this motion it will be

---

[28] *Id.* at ¶ 13.
[29] *Id.* at ¶ 22.
[30] *Id.* at ¶ 25.

deemed true, on January 24, 1971 Mr. Margulies told defense counsel that Mr. Stern had frightened and shocked him during their telephone conversation by confidently talking about the investigations "we" are conducting and the people "we" are going after.[31] Mr. Margulies apparently believed that Stern and the investigations were financed by "duPont money" and that Stern was part of a team working for duPont and the Justice Department.[32] Mr. Margulies was further told by Stern that duPont was "out to get" a number of people who had been associated with Mr. Bronston and apparently believed that if he testified on the defendant's behalf he would be one of those investigated and/or prosecuted by the Government.[33] However, and of great significance herein, is the fact that Mr. Margulies informed movant, and this is not disputed, "that his medical reason for not coming was bona fide".[34] A medical certificate was sent to counsel and is in fact annexed to defendant's affidavit filed in support of this motion.[35] It would be well to pause and note herein that this factor alone vitiates any argument that but for Mr. Stern, Mr. Margulies would have appeared and testified at the trial.

On January 22, 1971, the day after movant learned that Mr. Stern spoke to Mr. Margulies, and was granted permission to take Mr. Margulies' deposition and again delay the trial, counsel for the defense called Mr. Margulies in London who seemed reluctant to assist Mr. Bronston, but nevertheless agreed to a

---

[31] *Id.* at ¶ 41.

[32] *Id.*

[33] *Id.*

[34] *Id.* at ¶ 43.

[35] *Id.* and second unnumbered exhibit annexed to Affid. of Sheldon H. Elsen, Esq. (dated Mar. 16, 1971).

deposition on condition that his attorney, Mr. Poznansky, be present.[36]

Since Mr. Poznansky's passport had expired, and he could not obtain an emergency renewal, it was impossible for him to travel to London. As a result thereof and as a "substitute" condition for the deposition, a stipulation dictated by Mr. Poznansky was signed by defense counsel giving Mr. Poznansky veto power over the defendant's use of the deposition. Also at the insistence of Mr. Poznansky, counsel for movant agreed to limit his inquiry to the events precipitating the opening of the Geneva account.[37]

On January 23, 1971, the defense met alone with Mr. Margulies, who stated in repsonse to a question about what he told duPont in October of 1959 about the opening of the Geneva account, that he only informed him of the terms of the note which was discounted when the account was opened. After being confronted with various documents presumably to refresh his recollection, he admitted that he must have told Mr. duPont about the opening of the account. It will be noted that at the ensuing deposition he only admitted telling duPont about the terms and discounting of the note.[38] At this interview, Mr. Margulies refused to discuss the Dorchester transactions, and asked counsel for movant how he knew of his conversation with Mr. Stern. Mr. Margulies further stated that he wished to avoid getting personally involved in the investigation. At this point he also indicated that he feared that Mr. Stern was working with the prosecution and would have implicated him if he testified in New York.

---

[36] *Id.* at ¶ 28.
[37] *Id.* at ¶ 32.
[38] *Id.* at ¶ 36.

At the deposition on January 23, 1971, the following matter concerning this situation was put on the record:

> Now I will state for the record that Mr. Margulies has advised me that in a telephone conversation with Mr. Michael Stern, who states that he is employed by Mr. duPont, that if Mr. Margulies gave testimony that he would have his personal affairs dragged into the mud. This type of threat, which I restate only under the circumstances, under the conditions of this lawsuit, would otherwise not have been brought in, is relevant in considering the situation which we now face. We have the situation of a witness who has according to statements to me been threatened and regardless of whether the witness has anything relevant or not to be concerned about in any other context, there is no possible basis upon which he can be harassed at this examination by inquiry into his personal affairs on matters collateral to this lawsuit, which have nothing to do with the direct testimony. I again call upon Mr. Phillips to reserve for this matter the ruling of the Court and to complete any other questions which he may have to complete the record.[39]

The next day, the defense again met with Mr. Margulies who stated his version and the effect of his telephone conversation with Mr. Stern. As indicated *supra*, for purposes of this motion the Court has considered this as true.

Upon return from London, movant furnished the Court with a copy of the transcript of the deposition and enclosed a transmittal letter advising the Court that "The defendant expects to offer the deposition in its entirety, except for those questions, objections

---

[38] *Id.* at ¶ 36.

[39] *Id.* at ¶ 38 and Transcript of Deposition of Irwin Margulies, Esq. at 16 (dated Jan. 23, 1971).

and answers adduced on cross-examination when an effort was made to inquire into Swiss bank accounts of the witness." [40]

Again we must pause to note that conspicuously absent from this letter is the slightest hint of any of the issues raised herein.

It appears that Mr. Poznansky consented to the use of the deposition provided that no applications were made to have further questions put to the witness.[41]

In denying the requested relief and a hearing on the issues presented herein, it must be re-emphasized that Mr. Margulies could not have been a witness at the trial. In addition, we must note that although the deposition was not as exculpatory as defendant claims it would have been, Mr. Margulies did in fact give testimony favorable to the accused. The resulting situation is therefore that the defendant was allegedly deprived of a more exculpatory deposition.

Movant contends that the deposition was withdrawn and not offered at trial because Mr. Margulies' refusal to testify about Dorchester would have prejudiced his case. This contention is presently rejected as untimely,[42] since the defendant could have offered the deposition reserving his objections to the Government's inquiry as to Dorchester. I further reject the self-serving excuse that if the deposition were received with the Dorchester matter excised, the defendant's case would still have been prejudiced because of his failure to explain these transactions via Mr. Margulies; first, because he originally did not object to the introduction of evidence relating to Dorchester,[43]

---

[40] Letter from Sheldon H. Elsen, Esq. (dated Jan. 26, 1971).

[41] Affid. of Sheldon H. Elsen, Esq. at ¶ 47 (dated Mar. 16, 1971).

[42] *Id.* at ¶ 48.

[43] Tr. Jan. 29, 1971 at 3–4.

and, second, because the Dorchester issue was subsequently abandoned at trial and never mentioned in either summation.

It must next be considered the "less exculpatory deposition" did not in a strict sense deny the defense of any significant evidence. The matters sought to be brought out on the deposition by the defense were for the most part cumulative of record evidence,[44] and matters eloquently explained and emphasized to the jury on summation.[45]

That Mr. Poznansky imposed a limitation on the defendant's scope of inquiry and insisted on a veto power over the use of the deposition is of little moment since prior to the alleged threats by Mr. Stern, Mr. Margulies indicated that he "wanted to have the matter [his testimony] reviewed by his New York attorney, Benjamin Poznansky, Esq. * * *"[46] Moreover, since the Dorchester issue was abandoned at trial, it is equally irrelevant that movant was precluded from inquiring into this matter. And since Dorchester also appears to have been a personal financial matter to Mr. Margulies,[47] it would seem that by his assurances in November of 1970, movant's counsel agreed not to pursue such an issue. Although Mr. Margulies spoke freely about this matter in front of Mr. Bronston and his attorney in November, nothing in the moving affidavit suggests that he was willing to testify about it.[48] Presumably, the November conversation was not being transcribed—nor was Mr. Margulies under oath and subject to cross-examination.

---

[44] Def's. Exhs. I and J.

[45] Tr. Feb. 1, 1971 at 57–59.

[46] Affid. of Sheldon H. Elsen, Esq. at ¶ 13 (dated Mar. 16, 1971).

[47] *Id.* at ¶¶ 11–13.

[48] *Id.* at ¶ 11.

I also wish to re-stress the fact that after the deposition was completed the defendant never raised the issues discussed herein; rather, he merely withdrew the deposition from evidence. The Court does not dispute that in the conference in chambers on January 22, 1971, I indicated a strong disinclination to further delaying this trial, but this does not excuse defendant's complete failure to bring such extraordinary accusation to the Court's attention until several weeks after the trial has concluded. A criminal trial is not a game of chance wherein one may keep an "ace in the hole" in the event his client is convicted. Certainly movant's letter of January 26, 1971, wherein he indicated his intention to offer the deposition into evidence did not put the Court on adequate notice of the events underlying the deposition.

Finally, and with equal force, movant is reminded that the testimony that he sought to elicit was, in addition to being cumulative of other record evidence, completely collateral to the central issue in the case. Even if the jury were convinced that Mr. duPont was at all times fully aware of the existence and opening of the Geneva account, this would be no defense to the charge that Mr. Bronston willfully concealed this fact during his 21–A examination. The charge is perjury—not concealment of a bank account from Pierre duPont III.

I conclude, therefore, that movant is entitled to none of the relief requested and am not persuaded that *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Bray* v. *Peyton*, 429 F. 2d 500 (4th Cir. 1970); *Gregory* v. *United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966), cert. denied, 396 U.S. 865, 90 S. Ct. 143, 24 L. Ed. 2d 119 (1969); *Hernandez* v. *Nelson*, 298 F. Supp. 682 (N.D. Cal. 1968), modified on other grounds, 411 F. 2d 619 (9th

Cir. 1969), the principal cases cited by movant, compel a conclusion to the contrary.

Accordingly, and for the foregoing reasons, defendant's motions are in all respects denied.

So ordered.

APPENDIX B

EXCERPTS FROM TRIAL TRANSCRIPT OF FEBRUARY 2, 1971
(JURY INSTRUCTIONS)

[9] In short, perjury is the wilful giving of false testimony as to a material matter before a competent tribunal while under oath.

The hard core of the charge against a defendant accused of perjury is the contradiction between his belief and his oath. The basic issue, therefore, is whether the defendant spoke his true belief. Thus, perjury, which necessarily involves the state of mind of the accused, essentially consists of wilfully testifying to the truth of a fact which the defendant does not believe to be true. It is important to remember that it is the belief of the individual in the veracity of his sworn testimony which is crucial.

In order to find the defendant guilty of perjury on either count you must be satisfied beyond a reasonable doubt that three of the following four essential elements [10] of the crime have been proven:

> First, that on or about June 10, 1966, the defendant took an oath to testify truly before a referee in bankruptcy sitting in the Southern District of New York, a person authorized by law to administer oaths.
>
> Second: That the defendant made false statements as to matters about which he testified under oath as set forth in the indictment.
>
> Third: That such false statements were wilfully made in that at the time the defendant made these statements he fully understood the questions put to him but nevertheless gave false answers knowing the same to be false.

* * * * *

[11] Thus, your attention during your deliberations will, for the most part, be directed to the second and third elements of the crime charged. Consequently, you must determine whether any part of the testimony allegedly given by the defendant as set forth in both counts of the indictment was false, and if so, did the defendant give any part of that testimony with knowledge at that time that it was false.

Now before we consider the second and third elements of the crimes charged I think a few observations [12] would be in order.

First, you are instructed that if you find that the defendant did not understand a particular question put to him by the questioner and therefore gave a non-responsive answer, that answer cannot be perjurious. One cannot wilfully state a falsehood in response to a question he does not understand.

Similarly, if you conclude that the questions were less precise than they should have been, this may not be permitted to prejudice the defendant. This may be relevant with regard to count 2 of the indictment, for you must decide whether or not the questioner and witness understood the words "ownership" and "interests" to have the same meaning. This is, count 2 essentially charges that the defendant wilfully and knowingly falsely testified that the Spanish government owned the film Sinfonia Espanola and that he and the companies in which he had an interest did not own and have an interest in the film.

If you conclude that there was no meeting of the minds, that the questioner and the witness did not understand the words "own" and "interest" in the same sense, then you must acquit the defendant on the second count.

Thus, in order to convict on count 2 you must [13] be satisfied beyond a reasonable doubt that the de-

fendant understood the terms used but nevertheless wilfully gave a false answer.

Secondly, I instruct you that if you find that the defendant understood a particular question put to him and responded in a manner that is technically true he may still be guilty of perjury.

For example—and I use this as an illustration only—if it is material to ascertain how many times a person has entered a store on a given day and that person responds to such a question by saying five times when in fact he knows that he entered the store 50 times that day, that person may be guilty of perjury even though it is technically true that he entered the store five times.

On the other hand, if the person honestly thought that the questioner wanted to know how many times he entered during a given hour of the day and five was correct, then he has not testified falsely and may not be guilty of perjury.

Similarly, if you find that a particular answer is not literally false but when considered in the context in which it was given, nevertheless constitutes a false statement, the defendant may be guilty of perjury if all of the other essential elements of the crime exist.

* * * * *

[17] You will recall that another essential element of the crime of perjury is that the false testimony be given wilfully. The statute provides in part that a defendant is guilty of perjury when he wilfully states any material matter which he does not believe to be true.

Now initially I should like to instruct you that to act wilfully does not mean that one knew that he is violating a particular statute. In order to act wilfully it's only required that the act be knowingly and deliberately committed with the specific intent to do

something which the law forbids. In other words, to act wilfully is to act with bad purpose either to disobey or disregard the law.

The words "knowingly" and "wilfully" are therefore opposed to the idea of an inadvertent or accidental misstatement. For example, if the defendant by innocent mistake made an erroneous or incorrect statement he may not be found guilty of the crime of perjury.

Similarly, if you find that the defendant while [18] under oath gave factually incorrect testimony because of surprise, confusion, haste, inadvertence, negligence or an honest belief that he was telling the truth he may not be found guilty of perjury.

Thus, in order to convict you must be satisfied beyond a reasonable doubt that any false testimony given was knowingly and wilfully made with knowledge that it was false and with an intent to deceive.

Thus, if you find that at the time the defendant gave his testimony before the referee in bankruptcy he was aware of the fact that he was making a false statement and knew and believed that his statement was false when made, then he was acting knowingly and wilfully as these terms are used in the statute governing the crime of perjury.

U.S. GOVERNMENT PRINTING OFFICE: 1972